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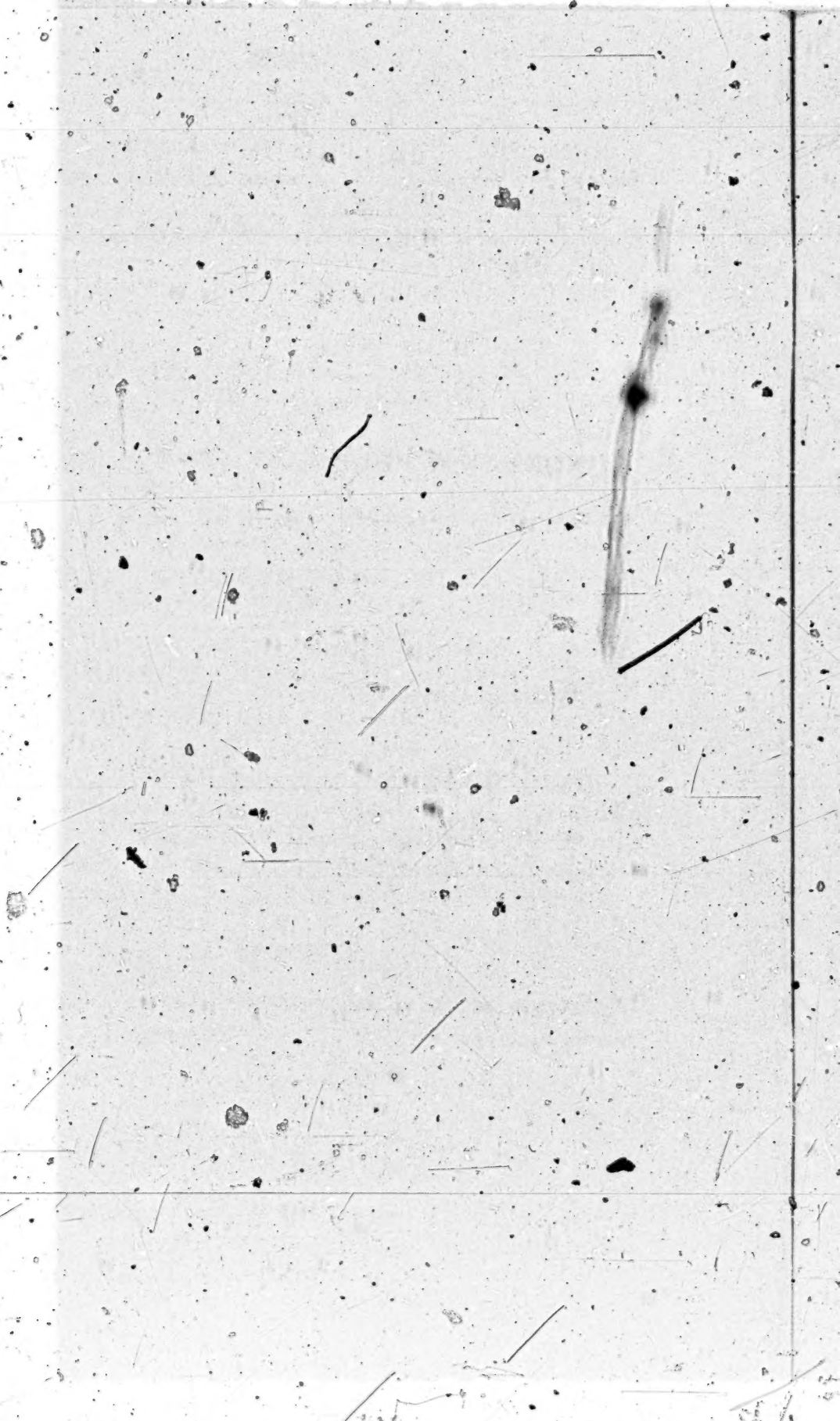

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 165

NORMAN H. BUCK AND MIGUEL R. GUERRA,
Appellants,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Appellee

OPENING BRIEF ON BEHALF OF APPELLANTS

Opinion Below

The opinion of the Justice Court is published on page 52 of the Transcript of Record; the opinion of the Appellate Department of the Superior Court of the State of California in and for the County of San Diego is published on page 31 of the Transcript of Record. The Petition for Rehearing was denied January 5, 1951 without opinion (R. 45).

Jurisdiction

Jurisdiction is conferred by Section 1254(2) and Section 2101(c) Title 28 U. S. Codes.

The judgment of the Court of Appeal was rendered Dec. 14, 1950 (R. 31). A petition for rehearing was duly and

regularly filed Dec. 21, 1950 (R. 36), and denied January 5, 1951 (R. 45). Notice of Appeal was filed January 15, 1951 (R. 46). The Order allowing the appeal was made by the Presiding Justice of the Appellate Department of the Superior Court (R. 55). This Court entered an order denoting probable jurisdiction on October 8, 1951 (R. 59).

Statutes Involved

Article I, Section 8, of the Constitution of the United States provides as follows:

> "Powers granted to Congress. (3) To regulate commerce with foreign nations, and among the several States, and with the Indian Tribes."

Ordinance No. 464 (New Series) of the County of San Diego, as follows:

> "Ordinance No. 464 (New Series)
>
> An Ordinance Regulating the Operation of Taxicabs Within the Unincorporated Area of San Diego County, and Requiring Permits and Licenses Therefor. (As Amended by Ordinances Nos. 609 (New Series), 958 (New Series), and 964 (New Series)
>
> The Board of Supervisors of San Diego County do ordain as follows:
>
> Section 1. As used in this ordinance, "taxicab" means a motor vehicle, as that term is defined in the Vehicle Code, used for the transportation of passengers for hire when driven by the owner or by an agent of the owner at rates per mile, per trip, per hour, per day, per week, per month, or per other period of time, which vehicle is routed under the direction of the passengers or other persons hiring such vehicle.
>
> Section 2. As used in this ordinance, "taxicab operator" means a person, firm, partnership, or corporation engaged in the business of running, driving,

or operating one or more taxicabs and carrying passengers in such taxicab or taxicabs for hire within the unincorporated area of the County of San Diego.

Section 3. As used in this ordinance, "taxicab driver" means an individual who drives or is in actual physical control of a taxicab in which passengers are carried for hire within the unincorporated area of the County of San Diego.

Section 4. *(Amended by Ord. No. 958 adopted 4-10-50, and amended again by Ord. No. 964 (New Series) adopted 5-22-50 to read as follows:)* Within 10 days from the effective date of this ordinance every taxicab operator shall apply to the sheriff and procure from the Tax Collector a license and pay an annual license fee of $50.00 (plus $1.00 per year per taxicab), which shall be paid by the applicant to the Tax Collector and shall be due on the first day of June of each year. Licenses issued subsequent to the first day of September, the first day of December, and the first day of March shall be issued at a quarterly reduction of $12.50 per quarter.

The sheriff may in his discretion direct the Tax Collector to issue a temporary permit pending final action on such application for license. If a license is revoked the license shall be forthwith surrendered to the sheriff, who shall thereupon deliver to the licensee a requisition for the refund of the unearned portion of the license fee, calculated to the nearest month. The sheriff may deny the application or having issued the license may revoke the same if the sheriff shall determine that the applicant or taxicab operator is of bad moral character or is guilty of violation of any of the provisions of this ordinance or of any lawful regulation promulgated pursuant thereto or has been convicted of any offense involving moral turpitude.

Applications for taxicab operator's licenses shall be filed with the sheriff on a form furnished by the sheriff which, when completed, will contain full personal information concerning the applicant, type of business to be conducted and description of equipment to be used.

Any person whose taxicab operator's license shall have been revoked or renewal thereof is refused by the sheriff may within ten days after receipt of notice thereof appeal to the Board of Supervisors for a hearing thereon and the decision of the Board of Supervisors shall be final. If no appeal is taken within ten days the action by the Sheriff shall be final.

To facilitate the hearing and disposition of such appeal, the Board of Supervisors may appoint a referee to take testimony and to report his findings and recommendations to the Board. If the Board appoints a county officer or county employee to act as referee, he shall serve as such referee without any additional compensation. All time spent as a referee shall be considered as time spent by such officer or employee in performing the duties of his position.

Section 5. The Tax Collector shall not issue a taxicab operator's license or permit unless and until instructed to do so by the sheriff.

Section 6. Every applicant for a taxicab operator's license shall file his application with the sheriff on a form to be furnished by the sheriff. The application shall be signed by the applicant and shall contain:

a) Name and address of the applicant.

b) Kind and amount of public liability and property damage insurance covering each vehicle to be used for the acceptance or carriage of passengers for hire within the County.

c) Owner's trade name and business address.

d) Number of vehicles to be used for accepting or carrying passengers for hire within the county, their make, model (year) and seating capacity.

e) Schedule of rates to be charged.

f) Such further information as the sheriff may require.

Section 7. The sheriff shall not order the issuance of any taxicab operator's license or temporary permit until the applicant first files with the sheriff a policy or certificate of insurance, which policy or certificate

shall comply with the provisions of this ordinance, and shall first be approved by the district attorney.

Section 8. The policy of insurance required before a taxicab operator's license or permit can be issued shall insure the public against any loss or damage for which the operator is legally liable that may result to any person or property from the operation of any taxicab used by the taxicab operator in his business as such. The maximum amount of recovery in such policy shall not be less than the following sums:

a) For the injury to any one person, or the death of any one person in any one accident, $10,000.

b) For the injury to two or more persons, or the death of two or more persons, or the injury to one person or more, and the death of one person or more, in any one accident, $20,000.

c) For the injury or destruction of property in any one accident, $5,000.

Section 9. *(Amended by Ord. No. 609 (New Series) adopted 5-12-47; and again amended by Ord. 958 (new Series) adopted 4-10-50, to read as follows:)* It shall be unlawful for any person to drive or to be in actual physical control of any taxicab in the unincorporated area of the County of San Diego without first obtaining a permit in writing so to do from the sheriff of the County of San Diego.

Applicants for such permits shall file applications therefor with the sheriff of the County of San Diego on a form furnished by the sheriff which, when completed, will contain full personal information concerning the applicant.

Upon obtaining a permit as herein required the holder of such permit shall be entitled to an identification card of such design, and bearing such number as the sheriff may prescribe, upon payment of a fee of $1.00 annually, therefor, which shall be paid by the applicant to the tax collector and shall be due on the 1st day of June of each year. Such card shall be carried

by the permittee during all business hours and shall not be transferable.

Each applicant for a permit shall be examined by the sheriff as to his knowledge of the provisions of this ordinance, the Vehicle Code, traffic regulations and the geography of the county, and if the result of the examination is unsatisfactory he shall be refused a permit. The sheriff may deny the application or having issued the permit may revoke the same if the sheriff shall determine that the applicant or taxicab driver is of bad moral character or is guilty of violation of any of the provisions of this ordinance or of any lawful regulation promulgated pursuant thereto or has been convicted of any offense involving moral turpitude.

The sheriff may in his discretion direct the tax collector to issue a temporary permit pending final action on such applicant for permit. If a permit is denied or revoked, the permit shall be forthwith surrendered to the sheriff. No portion of the fee for a temporary or permanent taxicab driver's permit shall be returnable upon denial or revocation of such permit.

Any person whose taxicab driver's permit shall have been revoked or renewal is refused by the sheriff, may within ten (10) days after receipt of notice thereof, appeal to the Board of Supervisors for a hearing thereon and the decision of the Board of Supervisors in this regard shall be final. If no appeal is taken within ten days, the action of the sheriff shall be final.

To facilitate the hearing and disposition of such appeal, the Board of Supervisors may appoint a referee to take testimony and to report his findings and recommendations to the Board. If the Board appoints a county officer or county employee to act as referee, he shall serve as such referee without any additional compensation. All time spent as a referee shall be considered as time spent by such officer or employee in performing the duties of his position.

Section 10. At time of filing application, every taxicab operator operating in the unincorporated area of

the County of San Diego shall file with the sheriff a true and correct statement of the rates to be charged for the transportation of passengers in any and all vehicles for hire operated by said operator, and such operator shall not change or modify said rates in any manner without first obtaining written approval from the sheriff and the filing of said modified or changed rates with the sheriff.

There shall be displayed in the passenger compartment of each taxicab in full view of the passengers a card not less than four inches by six inches in size, which shall have plainly printed thereon the name of the operator, or the fictitious name under which said operator operates, the business address and telephone number of said operator, and a correct schedule of the rates to be charged for conveyance in said vehicle.

Section 11. *(Amended by Ord. No. 958 (New Series) adopted 4-10-50, to read as follows:* Every taxicab operator shall keep such records and make such reports as the sheriff may require. The sheriff may adopt reasonable regulations not inconsistent with the provisions of this ordinance and the same shall be in force from and after their approval by resolution of the Board of Supervisors.

Section 12. It shall be unlawful for any person to solicit passengers for taxicabs in any public street, sidewalk, highway or place in the unincorporated area of the County of San Diego except the driver thereof when seated within the vehicle.

Section 13. Any person, firm or corporation violating any of the provisions of this ordinance shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by forfeiture of his permit, and by a fine not exceeding Five Hundred Dollars ($500), or by such forfeiture and imprisonment in the county jail for not more than six (6) months, or by both such forfeiture, fine and imprisonment.

Section 14. If any section, subsection, sentence, clause or phrase of this ordinance is for any reason held

to be unconstitutional, the Board of Supervisors hereby declares that it would have passed this ordinance irrespective of the fact that any one or more sections, subsections, sentences, clauses or phrases thereof be declared unconstitutional.

Section 15. This ordinance shall take effect and be in force at the expiration of thirty days from and after its passage, and before the expiration of fifteen days after its passage it shall be published once, with the names of the members voting for and against the same, in the San Diego Union, a newspaper of general circulation published in the County of San Diego.

Passed, approved and adopted this 1st day of April, 1946.

(S.) DAVID W. BIRD,
Chairman of the Board of Supervisors
of the County of San Diego,
State of California.

The above ordinance was adopted by the following vote:

Supervisor DeGraff Austin, voting "Aye"
Supervisor David W. Bird, voting "Aye"
Supervisor James A. Robbins, voting "Aye"
Supervisor Dan Rossi, voting "Aye"
Supervisor Dean E. Howell, voting "Aye"

Attest my hand and the seal of the Board of Supervisors this 1st day of April, 1946.

J. B. McLEES,
County Clerk and ex officio Clerk
of the Board of Supervisors.

By: (S.) M. NASLAND,
Deputy."

(R. 46-52)

Short Statement of the Facts

The appellants Norman H. Buck and Miguel H. Guerra are American citizens, who were engaged in the taxicab business, transporting passengers for hire, from the Federal Zone within the territory of Lower California, Republic of Mexico, to various points within the United States of America.

Ordinance 64 of the County of San Diego provides for the licensing of proprietors of taxicab businesses, designated in the ordinance as "taxicab operators," and for the licensing of drivers employed by these operators, and makes it unlawful for the operation of a taxicab in the unincorporated territory of San Diego County without a license (regardless of whether the passengers are to be let out in San Diego County, or elsewhere, or whether the cab is merely passing through the county.) Section 9 of the Ordinance further provides that the sheriff may revoke the permit if the sheriff thinks the cab driver is unfit to drive a cab. The sheriff is permitted to publish and promulgate certain rules and regulations governing the operation and use of taxicabs and cars for hire in the unincorporated area of San Diego County, California.

Regulation No. 6 provides in part:

> "Taxicabs licensed in counties other than San Diego will not be permitted to pick up passengers in San Diego County; no taxicab or car for hire licensed by this office will be permitted to pick up passengers outside the limits of San Diego County."

The appellants herein were arrested (R. 11-10). The appellants were charged in a complaint with having operated a taxicab, to-wit, a 1950 Ford Sedan, bearing a California Commercial State License No. 1199, in the unincorporated area of the County of San Diego, on Highway No.

101 in San Ysidro, without first having obtained a written permit from the sheriff of San Diego County, authorizing the defendants so to do. (R. 8, R. 9). A temporary restraining order and a preliminary injunction had been secured against a prior ordinance. (R. 11, 12). This ordinance was amended to its present form. Subsequent to the injunction, the appellants were advised by their counsel to continue their taxicab activities, but to restrict the same solely and exclusively to the picking up and discharging of passengers at points between the Mexican Federal Zone, within the Republic of Mexico, and points in the United States without the unincorporated area of the County of San Diego. (R. 12). And, at the time of their arrest in this case, were carrying passengers from the Republic of Mexico and merely passing through the County of San Diego, for the sole purpose of discharging the passengers on a continuous passage from the Republic of Mexico to places other than the unincorporated area of the County of San Diego within the State of California. (R. 13).

Prior to each arrest, the Office of the Sheriff received a telephone call from the defendants' taxicab competitor stationed on the American side of the border advising the sheriff's office that each defendant was leaving Mexico with passengers to the United States. At the place of arrest, the taxicab competitors of the defendants, stationed on the American side of the border, who would follow the defendants to the place of arrest, would have the passenger load of each defendant transferred to the said competitor's taxicab for hire and would take them to the passenger's designation in the United States.

The Ordinance requires the payment of a fee of $1.00 to the sheriff of San Diego County, and $50.00 to the Tax Collector for each taxicab, in June of each year. (R. 47).

The sheriff is given unlimited power to direct the Tax Collector to issue a temporary permit, to revoke the license, deny the application, or having issued the license revoke the same if the sheriff shall determine that the applicant, or taxicab operator, is of bad moral character or is guilty of violation of any of the provisions of the ordinance or of any lawful regulation promulgated pursuant thereto, or has been convicted of any offense involving moral turpitude. (R. 47).

The appellants were adjudged guilty and ordered to pay a fine of $250.00 or serve one day in jail for each $5.00 of time not paid. (R. 2). $200.00 of said fine is suspended for two years on condition that the defendant does not violate the ordinance during that period. (R. 2).

The Appellate Department of the Superior Court of the State of California in and for the County of San Diego, the last court which could review the ordinance on appeal, found the ordinance valid and sustained the conviction. (R. 31).

Locale

San Diego County is bounded on the west by the Pacific Ocean, and on the South by the Republic of Mexico. By predeliction it is one of two California counties which can control the only access between corporate body politics of the State of California, and sister States, to the Territory of Lower California, Mexico.

The thriving community of Tijuana is located directly across the border, in Mexico. It is the terminal of several Mexican airlines, and international commerce in its plenary definition exists between Mexico and the United States at this point, which as a necessary incident must pass through

the unincorporated County area of San Diego. The majority of traffic in passengers and goods originates and terminates in places other than said unincorporated area. Appellants, taxicab operators are not engaged in doing business within San Diego County. They neither pick up nor discharge international passengers within said County. Appellants, who are natural born American citizens, aver that they are engaged in foreign commerce in said taxicab business which is a useful one, and essential to the free intercourse of said international traffic, which business they have developed over a period of years, including the training essential to the conducting of said occupation for a livelihood of themselves and their respective families.

Contentions of Parties

Appellee, the County of San Diego, contends by ordinance that it is unlawful for any person to drive, or be in actual physical possession of any taxicab in the unincorporated area of the County of San Diego without first having obtained a County Permit, in writing, from the office of the Sheriff of said County. Appellants, who do not stop within said County in plying their business, contend that the said County may pass a valid regulation pursuant to its Police Powers, provided that said regulation does not amount to a burden or prohibition on foreign commerce. That if the regulation amounts to an unreasonable burden or prohibits foreign commerce, either on its face or in practice, that the same constitutes a violation of the Federal Constitution, and that the Appellants cannot be found guilty of a crime, by the enforcement of such an invalid regulation.

Appellants have been twice arrested and incarcerated, by the enforcement of the San Diego ordinance. The first time of their arrest, they procured a temporary injunction issued by the United States District Court, Southern District and

Division of California, and in attacking the Constitutionality of the ordinance, said Court found,

> "Said regulation is void as an attempted interference with or prohibition of interstate and foreign commerce insofar as it purports to restrict interstate or foreign commerce . . ."

The Court in the judgment (Tr. p. 23) further said,

> "It is hereby ordered, adjudged and decreed . . . that the portion of Regulation 6 of rules and regulations promulgated by the Sheriff of San Diego County governing the use and operation of taxicabs and cars for hire in the unincorporated area of San Diego County, reading as follows:
>
> > "Taxicabs licensed in counties other than San Diego County will not be permitted to pick up passengers in San Diego County; no taxicab or car for hire licensed by this office will be permitted to pick up passengers outside the limits of San Diego County,"
>
> is unconstitutional and void."

As a consequence of said decision the appellee did not proceed with the criminal prosecution of the action against appellants who were at the time doing a local and foreign business, but thereupon, on its own motion dismissed the action.

Inasmuch as there was a conflict of evidence before the local United States District Court as to whether the appellants did both a local and foreign business, by picking up passengers and discharging them, within the unincorporated area of San Diego, as well as without said area, and the Court so found. Appellants thereafter restricted their business activities to foreign commerce only, without discharging or picking up passengers within the County area.

The County of San Diego thereafter deleted from the Ordinance the regulation which had been held as void and

modified another portion of the Ordinance which was likewise held to be unconstitutional, but which had no reference to the problem of foreign commerce.

The Appellee through the office of the Sheriff after making said changes in the law arrested and incarcerated Appellents a second time. It is contended by the Appellants that the Appellee simply changed the ordinance to appear *valid on its face*, but that in order to nevertheless circumvent the Constitution of the United States, Appellee arrested Appellants the second time under color of a valid law, by the unconstitutional enforcement of the same.

Appellants then found themselves for the first time, before the State Courts, and although it was stipulated in the facts that they were solely engaged in foreign commerce, they were found guilty of a crime, by a Township Justices Court, which Court in its opinion said:

> "The defendants contend that the Sheriff, under color of authority, unlawfully discriminated against the defendants to suppress competition. This Court Will Not Consider the Question."

Since the State Court of first instance then, refused to consider the question, appellants appealed to the highest State Court of appellate jurisdiction. The decision of said tribunal affirmed the lower Courts decision. The assignment of errors as to said decision for purposes of this appeal, appear at Page 55, Transcript of the Record.

> The Lower Court Failed to Consider and Pass upon the Point That the Appellants and Each of Them Were Deprived of Their Constitutional Rights, under Color of Law.

In the opinion of the State Court the following appears verbatim:

> "According to the agreed statement of facts, the defendants were arrested while driving taxicabs on the

highways in unincorporated territory in San Diego County. The defendants were not stopping to pick up or discharge passengers, using the highways only as a means of transporting passengers for hire from the Republic of Mexico, on their way to a destination outside of the unincorporated areas of the County of San Diego. This was their usual course of business. When not in use, the taxicabs were stationed in Tijuana, Republic of Mexico, and all passenger service originated there. The defendants are American citizens."

"Each of the defendants had applied for and been denied the license required by the ordinance in question. One only of the defendants appealed from the Sheriff's decision to the Board of Supervisors, but his appeal was denied. No one of the defendants has sought in the (State) courts a review of the administration of the action." (Tr. pg. 32, fol. 57.)

San Diego County will not issue a license to anyone engaged in foreign commerce in the fashion of defendants, and will arrest anyone traversing the County.

From the stipulated facts, the following appears verbatim:

"That at the time of each arrest, the arresting officers ascertained that the defendants had picked up their passengers in Mexico, and were driving through the unincorporated area of San Diego County to discharge said passengers without the unincorporated limits of San Diego County. That prior to each arrest, the Office of the Sheriff received a telephone call from the defendants' taxi competitors stationed on the American side of the Border, advising said Sheriff's Office that each defendant was leaving Mexico with passengers to the United States. That based on said information, the Sheriff's Office intercepted the defendants in County territory and arrested them. At the place of arrest, taxi competitors of the defendants, stationed on the American side of the Border and who would follow the defendants to the place of arrest, would have the

passenger load of each defendant transferred to said competitors' taxicab and for hire would take them to the passenger's destination.'"

Under the facts, therefore, an American or Mexican citizen, whose destination in the United States was other than the limits of the County of San Diego, had to first enter into the United States, from the Republic of Mexico, in order to get taxicab service from taxicabs licensed by the County of San Diego, for if such passenger took a taxicab on the Mexican side with the competitors of those licensed by the County of San Diego, arresting officers on the American side would receive information that they had become passengers. When said passengers passed the border, a telephone call from appellants taxi competitors stationed on the American side of the Border would advise the Sheriff's Office that they were leaving Mexico. That thereafter based on said information, the Sheriff's Office would intercept their driver in County territory and arrest him, whereupon at the place of arrest, taxi competitors of the appellants, stationed on the American side of the Border and who would follow the appellants to the place of arrest, would have the passenger load of the arrested competitor transferred to the informing competitors taxicab, who for hire would then take the outraged passenger to his destination.

Under the above statement of facts, the Superior Court of San Diego County, from which this appeal has been taken, chose not to enter into a discussion, of whether the same did or did not constitute an undue or discriminatory burden upon foreign commerce, but instead summarily stated that a police regulation of the County was in existence. Under the authority of the *Bob-Lo Excursion Co.* vs. *Michigan* case, 333 U. S. 28, the State could make such laws which were local in nature, as it desired.

Said authority upon which the State Court predicated its decision involved Civil Rights and in no manner concerned the uniformity essential for the movement of vehicles in foreign commerce. The special local interests involved in said case did not involve international traffic or a continuation thereof, but was a specially insulated matter, involving a problem of segregation and the duty of carriers to provide equal service to all.

In the event the ordinance pursuant to which the defendants were charged and arrested appears on its fact to be consistent with the Federal Constitution, the Court must still determine whether the acts of the Sheriff of the County of San Diego have exceeded the local application of the ordinance and, whether under the color or pretense of said ordinance, the Sheriff has nevertheless violated the Federal law and arrested the defendants while lawfully engaged in foreign commerce.

In case of *Home Tel. & Tel. Co.* vs. *Los Angeles*, reported in 227 U. S. 278, is authority for the point of what is meant by a wrong done by a state officer misusing the authority of the state with which he is clothed.

In other words, if a State Officer does an unconstitutional act, under such circumstances inquiry into whether the State has authorized the wrong is irrelevant.

In said case, the attorneys representing the City of Los Angeles asserted that "no power existed in a Federal Court to consider the subject until by final action of an appropriate State Court it was decided that such acts were authorized by the State and were therefore not repugnant to the State Constitution." This argument fell by the wayside.

This court therefore, without considering the State aspect of the case, may forthwith apply the Federal Law.

Said the court at page 287:

"Here again the settled construction. . . . is that it presupposes the possibility of an abuse by a state officer or representative of the powers possessed and deals with such a contingency. "It provides, therefore, for a case where one who is in possession of state power uses that power to the doing of the wrongs which the Amendment forbids even though the consummation of the wrong act may not be within the powers possessed if the commission of the wrong itself is rendered possible or is efficiently aided by the state authority lodged in the wrongdoer . . . where an officer or other representative of a State in the exercise of the authority with which he is clothed misuses the power possessed to do a wrong forbidden . . . inquiry concerning whether the State has authorized the wrong is irrelevant and the Federal judicial power is competent to afford redress for a wrong by dealing with the officer and the result of his exertion of power."

(See Pg. 5, Paragraph VII, Stipulated Facts).

The opinion continues on page 288, as follows:

"That is to say, a state officer cannot on the one hand as a means of doing a wrong forbidden by the Amendment proceed upon the assumption of the possession of state power and at the same time for the purpose of avoiding the application of the Amendment, deny the power and thus accomplish the wrong."

The Lower Court Stated That an Annual Fee of $1.00 for Administrative Costs on Foreign Commerce Was Not Unreasonable But Failed to Pass Upon the Reasonableness of the $50.00 Annual Fee About Which the Appellants Complained.

In the San Diego County Ordinance, appears the following language:

"Within 10 days from the effective date of this ordinance every taxicab operator shall apply to the

Sheriff and procure from the Tax Collector a license and pay an annual license fee of $50.00 (plus $1.00) per year per taxicab. . . ."

Despite the fact that appellants argued and submitted authorities of law, upon the question of the annual license fee of $50.00, before the State Court, said Court, in its opinion (Tr. pg. 34) disposed of the point with the following language:

"In this respect the ordinance exacts of the defendants at the point where they complain an annual fee of $1.00 which is no more than the cost of its administration. Defendants offer no evidence to the contrary (citing cases). One attacking as unreasonably burdening commerce the validity of a regulatory or taxing measure . . . has the burden of showing a want of reasonable relation to the increased cost of maintenance and policing due to such traffic."

Questions Presented by This Appeal

I

WHETHER A COUNTY ORDINANCE OF THE COUNTY OF SAN DIEGO REQUIRING TAXICABS PASSING THROUGH THE UNINCORPORATED AREA OF THE COUNTY OF SAN DIEGO, STATE OF CALIFORNIA TO OBTAIN A PERMIT IN WRITING FROM THE SHERIFF OF THE COUNTY OF SAN DIEGO, TO PAY AN APPLICATION FEE OF $1.00 AND A LICENSE FEE TO $50.00, TO BE EXAMINED BY THE SHERIFF AS TO THE APPLICANT'S KNOWLEDGE OF THE PROVISIONS OF THE ORDINANCE, KNOWLEDGE OF THE VEHICLE CODE, TRAFFIC REGULATIONS, AND GEOGRAPHY OF THE COUNTY, AND PERMITTING THE SHERIFF TO GRANT OR DENY THE PERMIT UNDER CERTAIN SPECIFIED CONDITIONS, IS IN VIOLATION OF ARTICLE I SECTION 8 OF ARTICLE 3 OF THE CONSTITUTION OF THE UNITED STATES WHEN APPLIED TO TAXICABS CARRYING PASSENGERS FROM THE REPUBLIC OF MEXICO TO PLACES IN THE UNITED STATES OTHER THAN THE COUNTY OF SAN DIEGO, ALTHOUGH THE CAB HAS TO PASS THROUGH THE COUNTY OF SAN DIEGO TO REACH ITS DESTINATION.

II

WHETHER SUCH AN ORDINANACE INHERENTLY AND AS CONSTRUED AND APPLIED IN THIS CASE, CONSTITUTES AN UNCONSTITUTIONAL BURDEN ON INTERNATIONAL COMMERCE WHERE THE CAB WAS MERELY PICKING UP PASSENGERS IN MEXICO AND BRINGING THEM THROUGH THE COUNTY OF SAN DIEGO TO OTHER DESTINATIONS OF THE UNITED STATES, AND WERE NOT IN ANYWISE VIOLATING ANY LAW, OR OTHERWISE DOING ANYTHING WRONG OTHER THAN THAT THE DRIVER DID NOT HAVE A LICENSE UNDER THE SAN DIEGO COUNTY ORDINANCE NO. 464.

III

WHETHER A COUNTY MAY PASS AN ORDINANCE REQUIRING EVERY VEHICLE THAT PASSES THROUGH IT IN INTERNATIONAL COMMERCE AND CARRYING PERSONS FOR HIRE FROM THE OTHER COUNTRY TO SOME DESTINATION IN THE UNITED STATES MAY BE REQUIRED TO HAVE THE DRIVER LICENSED AND TAXED WHEN IT PASSES THROUGH THE COUNTY OF SAN DIEGO TO HIS NECESSARY DESTINATION.

WHETHER THE ORDINANCE, INHERENTLY AND AS CONSTRUED AND APPLIED IN THIS CASE, WAS UNDULY DISCRIMINATORY.

IV

WHETHER THE COMMERCE BETWEEN NATIONS, WHICH HAS BEEN REGULATED BY THE NATIONAL TRANSPORTATION POLICY ACT (49 U.S.C.A. 301-327), SECTION 303(b) AND CODE OF FEDERAL REGULATIONS PARTS 190-197, SO AS TO EXCLUDE LOCAL COUNTY ORDINANCES AND PLACING UNREASONABLE BURDEN UPON INTERNATIONAL COMMERCE.

V

WHETHER THE ORDINANCE, CONTAINING NO SPECIAL PROHIBITIONS RELATING TO POLICE POWERS OR REASONABLY RELATED TO ITS PURPOSE IS UNCONSTITUTIONAL.

Specification of Errors

The appellants assign each of the questions presented as its Specification of Errors.

ARGUMENT

The statute, inherently, and as construed and applied in this case, unreasonably burdens commerce between the friendly Republic of Mexico and the United States of America.

Here is an ordinance which required the appellants, carrying passengers from the friendly Republic of Mexico to destination in the United States other than the Republic of Mexico and to destinations not in the County of San Diego, to obtain a permit and pay a license fee to the County of San Diego, and to subject the drive to the burden of satisfying the sheriff, a single officer, as to a number of things.

Such a statute unduly burdens commerce. It is not contended by the County of San Diego that the tax measure was for the purpose of maintenance in policing due to traffic, nor is it contended that the ordinance had this purpose. Its exaction discriminates against interstate commerce. It does not apply alike to local and interstate and national commerce.

Aero Mayflower Transit Co. v. *Board of Railroad Commissioners*, 332 U. S. 495, 92 L. Ed. 99.

As construed by the California Court, the principal requirement of the Ordinance is that the carrier's operator be of good moral character (R. 35). But, this requirement is also a requiremen of the State of California in issuing a State Driver's License.

It has always been held that goods passing in transit from one state to another may not be unduly burdened and may not be subject to local inspection.

Ever since *Gibbons* v. *Ogden*, 9 Wheat. (U. S.) 1, 6 L. Ed. 23, the States of the United States have not been deemed to

have authority to impede substantially the free flow of commerce from state to state, or to regulate those phases of the national commerce which because of the need of national uniformity demanded that the regulation, if any, be prescribed by a single authority.

Cooley v. *Board of Wardens*, 12 How. U. S. 319, 13 L. Ed. 1004;

Leisy v. *Hardin*, 135 U. S. 100, 108, 109, 34 L. Ed. 128, 132;

3 Interstate Commerce Reports 36 Minnesota late cases (*Simpson* v. *Shepard*, *supra*, 230 U. S. 399, 400, 57 L. Ed. 1541, 1542).

Edwards v. *California*, 314 U. S. 160, 167, 86 L. Ed. 119.

The same rule should apply in Interstate Commerce—more so with the friendly Republic of México. The principle that without controlling congressional action a State may not regulate interstate commerce so as substantially to effect its flow or deprive it of needed uniformity in its regulation is not to be avoided by "simply invoking the convenient apologetics of the police power," *Kansas Southern R. Co.* v. *Kaw Valley Drainage Dist.*, *supra* (233 U. S. 79, 58, L. Ed. 859, 34 S. Ct. 564); *Buck* v. *Kuykendall*, 267 U. S. 307, 315, 69 L. Ed. 623, 626, 45 S. Ct. 324, 38 A. L. R. 286.

Southern Pacific Co. v. *Arizona*, 325 U. S. 761, 779. In the case of *Southern Pacific Co.* v. *Arizona*, the court further states:

> "In the Kaw Valley Drainage Dist. Case the Court held that the state was without constitutional power to order a railroad to remove a railroad bridge over which its interstate trains passed, as a means of preventing floods in the district and of improving its drainage, because it was 'not pretended that local welfare needs the removal of the defendants' bridges at the expense of the dominant requirements of commerce with other

states, but merely that it would be helped by raising them.' And in Seaboard Air Line R. Co. v. Blackwell, 244 U. S. 310, 61 L. Ed. 1160, 37 S. Ct. 640, L. R. A. 1917F 1184, it was held that the interference with interstate rail transportation resulting from a state statute requiring as a safety measure that trains come almost to a stop at grade crossings, outweigh the local interest in safety, when it appeared that compliance increased the scheduled running time more than six hours in a distance of one hundred and twenty-three miles. Cf. Southern R. Co. v. King, 217 U. S. 524, 54 L. Ed. 868, 30 S. Ct. 594, supra, where the crossings were less numerous and the burden to interstate commerce was not shown to be heavy; and see Erb v. Morasch, 177 U. S. 584, 44 L. Ed. 897, 20 S. Ct. 819.

"Similarly the commerce clause has been held to invalidate local 'police power' enactments fixing the number of cars in an interstate train and the number of passengers to be carried in each car, South Covington & C Street R. Co. v. Covington, supra (235 U. S. 543, 59 L. Ed. 352, 35 S. Ct. 158, L. R. A. 1915F 792, P. U. R. 1915A 231), regulating the segregation of colored passengers in interstate trains, Hall v. DeCuir, supra (95 U. S. 488, 489, 24 L. Ed. 548), requiring burdensome intrastate stops of interstate trains, Illinois C. R. Co. v. Illinois, 163 U. S. 142, 41 L. Ed. 107, 16 S. Ct. 1096; Cleveland, C. C. & St. L. R. Co. v. Illinois, 177 U. S. 514, 44 L. Ed. 868, 20 S. Ct. 722; Mississippi R. Commission v. Illinois C. R. Co., 203 U. S. 335, 51 L. Ed. 209, 27 S. Ct. 90; Herndon v. Chicago, R. I. & P. R. Co., 218 U. S. 135, 54 L. Ed. 970, 30 S. Ct. 633; St. Louis-San Francisco R. Co. v. Public Serv. Commission, 261 U. S. 369, 67 L. Ed. 701, 43 S. Ct. 380, requiring an interstate railroad to detour its through passenger trains for the benefit of a small city, St. Louis & S. F. R. Co. v. Public Serv. Commission, 261 U. S. 369, 67 L. Ed. 701, 43 S. Ct. 380, supra, interfering with interstate commerce by requiring interstate trains to leave on time, Missouri K. & T. R. Co. v. Texas, 245 U. S. 484, 62 L. Ed. 419, 38 S. Ct. 178, P. U. R. 1918B 602, regulating car distribu-

tion to interstate shippers, St. Louis Southwestern R. Co. v. Arkansas, 217 U.S. 136, 54 L. Ed. 698, 30 S. Ct. 476, 29 L. R. A. (N. S.) 802, or establishing venue provisions requiring railroads to defend accident suits at points distant from the place of injury and the residence and activities of the parties, Davis v. Farmers Co-op. Equity Co., 262 U. S. 312, 67 L. Ed. 996, . . . South Carolina State Highway Dept. v. Barnwell Bros. supra (303 U. S. 184, 185, note 82 L. Ed. 738, 739)."

Since the local ordinance is designed to impede and stop the flow of human commerce from Mexico to other places in the United States through San Diego County, it is an unreasonable burden on interstate commerce and violates Article I, Section 8, Clause 3 of the Constitution. The ordinance interferes with and delays the movements of international commerce.

"Goods in transit from another country while in transit are immune from state taxation."

Article I, Section 10, Clause 2 of the Constitution;
Hooven & Allison Co. v. *Evatt*, 324 U. S. 654, 656, 89 L. Ed. 1258.

We think that the same principle should apply to taxicabs traveling in interstate commerce. The immunity from local taxation survives, "that immunity survives their arrival in this country and continues" until reaching their destination, and in the case of articles in transit until they are removed from the original package.

We think that Good Neighborly Policy under our treaties with Mexico and our Mutual Trade Pacts require such a determination.

The treaties of Amity, Commerce and Navigation have continuously been ratified between the two countries, and as construed and applied in this case was arbitrary, capricious and discriminately administered.

Prior to each arrest, the Office of the Sheriff received a telephone call from the defendants' taxi competitors stationed on the American side of the border, advising the sheriff's office that each defendant was leaving Mexico with passengers to the United States. Based on this information, the Sheriff's Office intercepted defendants in county territory and arrested them. At the place of arrest, taxi competitors of the defendants stationed on the American side of the border, who would follow the defendants to the place of arrest, would have the passenger loads of each defendant transferred to said competitor's taxicab and for hire would take them to the passenger's destination (R. 14).

In *Aero-Mayflower Transit Corp* vs. *RR Com.* 332 U.S. 495, 92 L. Ed 99, the court said:

> "That is true, although this Court has held invalid, as forbidden by the commerce clause, certain state taxes on interstate motor carriers because laid not as compensation for the use of the highways but for the privilege of doing the interstate bus business. *Interstate Transit* v. *Lindsey*, 283 U. S. 183, 186, 75 L. ed. 953, 969, 51 S. Ct. 380; cf. *McCarroll* v. *Dixie Greyhound Lines*, 309 U. S. 176, 179, 84 L. ed. 683, 686, 60 S. Ct. 504."

In *Toomer* v. *Witsell*, 334 U. S. 385, this Court held a South Carolina statute unconstitutional in violation of Article I, Section 8 of the Constitution where it required that owners of shrimp boats fishing in the maritime belt of South Carolina to dock at a South Carolina port, and unload, pack and stamp their catch (with a tax stamp) before shipping or transporting it to another state.

The Court pointed out in the opinion that the South Carolina Statute plainly and frankly discriminates against non-residents, and is so great that its practical effect is virtually exclusionary.

The Court, speaking through Chief Justice Vinson, said:

> "But the importance of having commerce between the forty-eight States flow unimpeded by local barriers persuades us that State restrictions inimical to the commerce clause should not be approved simply because they facilitate in some measure enforcement of a valid tax."

In 15 Corpus Juris Secundum § 102 it is stated:

> "A State may not discriminate in its taxation against products of other states or foreign countries.
>
> "A state may not in any way discriminate in its taxation against interstate commerce or the products and manufacturers of other state or foreign countries. . . ."

The California Court held that

> "The principal requirement of the ordinance is that the carrier's operator be of good moral character. This is a reasonable requirement of police regulations. (*in re* Porterfield 63 Cal. App. (2) 518, 536). There is no such specific requirement in the federal regulations, Parts 190-197. Having in mind the purpose of the Act of 1940, *supra*, to cooperate with the State and its duly authorized officials, we can see no conflict here."

The purpose of the California local ordinance finds a striking parallel in the case of *Di Santo* v. *Pennsylvania*, 273 U. S. pg. 34, 71 L. ed. p. 525, at 526 wherein this Court struck down a Pennsylvania law which required a license and the payment of a fee of $50.00 annually to sell steamship tickets or orders to or from foreign countries. This Court struck down the law saying:

> "The soliciting of passengers and the sale of steamship tickets and orders for passage between the United States and Europe constitute a well-recognized part of foreign commerce. See *Davis* v. *Farmers Co-op.*

Equity Co. 262 U. S. 312, 315, 67 L. ed. 996, 998, 43 Sup. Ct. Rep. 556. A state statute which by its necessary operation directly interferes with or burdens foreign commerce is a prohibited regulation and invalid, regardless of the purpose with which it was passed. *Shafer* v. *Farmers Grain Co.* 268 U. S. 189, 199, 69 L. ed. 909, 914, 45 Sup. Ct. Rep. 481, and cases cited. Such legislation cannot be sustained as an exertion of the police power of the State to prevent possible fraud. *Real Silk Hosiery Mills* v. *Portland*; 268 U. S. 325, 336, 69 L. ed. 982, 45 Sup. Ct. Rep. 525. The Congress has complete and paramount authority to regulate foreign commerce and, by appropriate measures, to protect the public against the frauds of those who sell these tickets and orders. The sales here in question are related to foreign commerce as directly as are sales made in ticket offices maintained by the carriers and operated by their servants and employees. The license fee and other things imposed by the Act on plaintiff in error, who initiates for his principals a transaction in foreign commerce, constitute a direct burden on that commerce. This case is controlled by *Texas Transport & Terminal Co.* v. *New Orleans*, 264 U. S. 150, 68 L. ed. 611, 34 A. L. R. 907, 44 Sup. Ct. Rep. 242, and *McCall* v. *California*, 136 U. S. 104, 34 L. ed. 391, 3 Inters. Com. Rep. 181, 10 Sup. Ct. Rep. 881.

"Judgment reversed."

In California there is a presumption fixed by State law that one is innocent of crime or wrong,

California Code of Civil Procedure, Section 1963 Sub. 1.

There is also a presumption under California law that a person's character is presumed to be of ordinary fairness (*People* vs. *Johnson* 61 Cal. 142).

In *Regl Silk Hosiery Mills* vs. *Portland* 268 U. S. 325, 69 L. ed. 982, this Court held an ordinance requiring persons

going from place to place soliciting orders for goods for future delivery to secure a license and give a bond as unconstitutional in materially burdening interstate commerce.

In *McCall* vs. *People of the State of California*, 136 U. S. 104, 34 L. ed. 391, this Court struck down an ordinance of the City of San Francisco which required a railway agent to secure a license before he could sell tickets for trips East. The Court held that the San Francisco ordinance unconstitutionally burdened interstate commerce.

The power to regulate foreign and interstate commerce having been given to Congress, that power is necessarily exclusive whenever the subjects of it are national in their character, or are such as to admit of one uniform plan or system of regulation.

Cooley v. *Port Wardens*, 12 How. 299, 319, 13 L. ed. 996, 1004; *Gibbons* v. *Ogden*, 9 Wheat. 16 L. ed. 23; *Brown* v. *Maryland*, 12 Wheat. 419, 6 L. ed. 678; Passenger Cases, 7 How. 283, 12 L. ed. 702; *Crandall* v. *Nevada*, 6 Wall. 35, 42, 18 L. ed. 745, 746; *Ward* v. *Maryland*, 12 Wall. 418, 430, 20 L. ed. 449, 452; State Freight Tax Case, 15 Wall. 232, 279, 21 L. ed. 146, 162; *Henderson* v. *New York* (*Henderson* v. *Wickham*) 92 U. S. 259, 272, 23 L. ed. 543, 549; *Hannibal & St. J. R. Co.* v. *Husen*, 95 U. S. 465, 469, 24 L. ed. 527, 529; *Mobile County* v. *Kimball*, 102 U. S. 691, 697, 26 L. ed. 238, 239; *Gloucester Ferry Co.* v. *Pennsylvania*, 114, U. S. 196, 203, 29 L. ed. 158, 161, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; *Wabash, St. L. & P. R. Co.* v. *Illinois*, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4.

When the power of Congress to regulate is exclusive, the failure of Congress to make express regulations indicates its will that the subject shall be free from regulation.

Bowman v. *Chicago & N. W. R. Co.* 125 U. S. 465 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; *Gibbons* v. *Ogden*, 9 Wheat. 16 L. ed. 23; Passenger Cases, 7 How. 283, 462, 12 L. ed. 702, 777;

State Freight Tax Case, 15 Wall. 232, 279, 21 L. ed. 146, 162; *Hannibal & St. J. R. Co.* v. *Husen*, 95 U. S. 465, 24 L. ed. 527; *Welton* v. *Missouri*, 91 U. S. 275, 282, 23 L. ed. 347, 350; *Covington & C. Bridge Co.* v. *Kentucky*, 154 U. S. 204, 38 L. ed. 962, 4 Inter. Com. Rep. 649, 14 Sup. Ct. Rep. 635; *Brown* v. *Houston*, 114 U. S. 622, 631, 29 L. ed. 257, 260, 5 Sup. Ct. Rep. 1091.

The states under the guise of the police power cannot pass legislation placing a direct and primary burden on interstate or foreign commerce, where that commerce is essentially national in character.

Hall v. *De Cuir*, 95 U. S. 485, 24 L. ed. 547; *Louisville & N. R. Co.* v. *Central Stock Yards Co.* 212 U. S. 132, 53 L. ed. 441, 29 Sup. Ct. Rep. 246; *McNeill* v. *Southern R. Co.* 202 U. S. 543, 50 L. ed. 1142, 26 Sup. Ct. Rep. 722.

Defendant was engaged in foreign commerce essentially national in character; the Pennsylvania statute places a direct and primary burden on that commerce, and is, therefore, unconstitutional and void.

Davis v. *Farmers' Co-op. Equity Co.* 262 U. S. 312, 315, 67 L. ed. 996, 998, 43 Sup. Ct. Rep. 556; *Crutcher* v. *Kentucky*, 141 U. S. 47, 58, 35 L. ed. 649, 652, 11 Sup. Ct. Rep. 851; *Texas Transport & Terminal Co.* v. *New Orleans*, 264 U. S. 150, 68 L. ed. 611, 34 A. L. R. 907, 44 Sup. Ct. Rep. 242; *McCall* v. *California*, 136 U. S. 104, 34 L. ed. 391, 3 Inters. Com. Rep. 191, 10 Sup. Ct. Rep. 881; *Real Silk Hosiery Mills* v. *Portland*, 268 U. S. 325, *Stockard* v. *Morgan*, 185 U. S. 27, 46 L. ed. 785, 22 Sup. Ct. Rep. 576; *Rearick* v. *Pennsylvania*, 203, U. S. 507, 51 L. ed. 295, 27 Sup. Ct. Rep. 159; *Brennan* v. *Titusville*, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829; *Robbins* v. *Taxing Dist.* 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; *Singer Sewing Mach. Co.* v. *Brickell*, 233 U. S. 304, 58 L. ed. 974, 34 Sup. Ct. Rep. 493; *Stewart* v. *Michigan*, 232 U. S. 665, 58 L. ed. 786, 34 Sup. Ct. Rep. 476; *Crenshaw* v. *Arkansas*, 227 U. S. 389, 57 L. ed. 565, 33 Sup. Ct. Rep. 294; *Rogers* v. *Arkansas*, 227 U. S. 401, 57, L. ed. 569, 33 Sup. Ct.

Rep. 298; *Asher* v. *Texas*, 128 U. S. 129, 32 L. ed. 368, 2 Inters. Com. Rep. 241, 9 Sup. Ct. Rep. 1; *Stoutenburgh* v. *Hennick*, 129 U. S. 141, 32 L. ed. 637, 9 Sup. Ct. Rep. 256; *Barrett* v. *New York*, 232 U. S. 14, 31, 58 L. ed. 483, 490, 34 Sup. Ct. Rep. 203.

In the case of Hood & Sons, 336 U. S. 525, the State denied a license to a milk dealer doing business in an adjacent state, as in our case the County of San Diego has refused to issue licenses to the defendants. The license was denied on the grounds that if given it "would tend to a destructive competition in a market already adequately served, and would not be in the public interest."

Needless to say, the article of "milk" is certainly one which comes within the protective provisions of the police powers of the State, and that pursuant thereto within the regulative powers of the State.

Simply because the article of milk is one which may be treated by health and safety considerations is not in itself sufficient to permit a state to assert itself. Thus on page 531 of the opinion, the Court said:

> "In neither case is the measure supported by health or safety considerations but solely by protection of local consumption and limitation of competition. This Court unanimously rejected the State's contention in the *Seelig case* and held that the Commerce Clause, even in the absence of congressional action, prohibits such regulations for such ends."

Again in said case (*supra*) making reference to other concurring authorities, it is stated at page 538:

> "In so speaking it but followed the principle that the state may not use its admitted powers to protect the health and safety of its people as a basis for suppressing competition. In *Buck* v. *Kaykendall*, 267 U. S. 307, the Court struck down a state act because, in the language of Mr. Justice Brandeis: 'Its primary pur-

pose is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition.' "

Apparently all that the majority of the Court needed was a showing that just *one* of the reasons which prompted the State's action was unconstitutional, even though there might have been other reasons within the admitted powers of the state to exact. In the case at bar, appellants competitors are not engaged in foreign commerce and the County of San Diego in order to favor local competitors, cannot deny appellants access to areas in the United States without the unincorporated area of the County of San Diego by putting said appellants in jail because they pass through the said County of San Diego, to unload passengers without the confines of that political entity, and despite that fact that said international commerce may interfere with said competitors who restrict their activities to within said County of San Diego.

The case of *Nippert* v. *Richmond*, 327 U. S. 417, involved the question of an Ordinance which was discriminatory in favor of local merchants as against out-of-state merchants. It involved an appeal from a judgment which affirmed a conviction for the violation of a municipal ordinance imposing a license tax.

This Court said at page 427:

> "And, regardless of the discretionary element in the issuing function of the Director of Public Safety, his permit was required with payment of the tax before the license could issue or the act of solicitation could lawfully take place, criminal sanction being prescribed for violation. So far as appears a single act of unlicensed solicitation would bring the sanction into play."

In the case at bar, before a taxicab may pass through San Diego County territory, a permit is required with the neces-

sity of prepaying $50.00. Such payment is a prerequisite for the issuance of a permit, and a criminal sanction is prescribed for the violation. Let us not forget that defendants are denied licenses, thereby compelling them against their will to violate the County Ordinance. Assuming, however, that the defendants did pay the flat fee charged by the County, and only did a foreign or interstate business, the ordinance would still be unconstitutional, as specifically applied to the defendants in the case at bar.

At page 430 (*infra*) of the opinion in the above case, reference is made to the following:

> ". . . at one time an itinerant trucker, who went through all the counties of the State, would have been obliged to pay $4,400.00 in fees in addition to posting a bond for $5,000.00. In addition, licensing statutes, otherwise fair on their face, are said to have been discriminatorily enforced against itinerant merchants."

There are, by the same token, fifty-eight counties in the State of California. If each county passed a law similar to the one passed by the County of San Diego, a taxicab operator would be obliged to pay $2,900.00 to avoid criminal sanctions should a customer desire to be taken from Mexico to Oregon, or to a sister state, which is not too rare an occasion.

It is not incumbent upon the appellants to concretely prove to this Court that they are prevented from taking customers from Mexico to the State of Oregon, or to a sister state. They merely need show that in effect the law as passed by the County of San Diego could prevent such commerce. In other words, the Supreme Court of the United States feels that it would be unwise to wait until each and every County of the State of California would pass a $50.00 fee as a condition to holding the same unconstitutional. The time to control the evil is at its inception.

The prior case of *Nippert* v. *Richmond* (327 U. S. 417) is not the only case where an apparently fair ordinance was held unconstitutional, by reason of the manner in which it was enforced. There are many others.

The Sheriff of the County of San Diego cannot, under color or pretense of a valid law, deprive the defendants, or any of them, of any constitutional right. Under color of law means under pretense of law. *Nippert v. Richmond*, 327 U. S. 417.

There is no evidence in the stipulated facts that there is an increased cost of maintenance and policing due to such traffic. There was no evidence to support the arbitrary and unsupported conclusion of said Court that the enforcement and supervision of taxicabs which pass through the County requires as much supervision and enforcement as those who spend all of their time within the limits of the unincorporated area, with its countless hotels, bars, and places of amusement.

The only facts before the court are those that were stipulated to, which facts indicate that the appellants do not stop within the unincorporated limits of the county. The stipulation further said,

> "were carrying passengers at the time of their arrests within the unincorporated area of the county of San Diego, through which county they were passing for the sole purpose of discharging said passengers on a continuous passage from the Republic of Mexico to places other than the unincorporated area of the county."

II

The ordinance inherently places in the hands of a single executive and administrative officer, the sheriff, the power to grant or revoke a license upon his whim, will and discretion.

Such a power is that exercised in totalitarian countries. (See *Phyle* v. *Duffy*, 334 U. S. 431.)

Such action imposes an unnecessary restriction and undue burden on interstate commerce.

More than that, however, the exercise of the power in this case was arbitrary and capricious as aroused by competitors of the appellants, and placed an undue and unnecessary burden upon them in transporting passengers from the Republic of Mexico into the United States.

Unlike *California* v. *Zook*, 336 U. S. 725, the ordinance was not designed to combat an evil as shown by that case to exist in respect to wildcat jitney buses; nor was the San Diego County Ordinance designed to meet such an evil.

The California Courts' construction of the Ordinance is that its principal requirement was that the carrier's operator be of good moral character (R. 35).

The stipulated facts, paragraph III thereof indicate that the portion of the Ordinance, Section 9 thereof, and which was declared unconstitutional by the United States District Court, in the injunction suit brought by appellants reads as follows:

> "The Sheriff may deny the application, or, having issued a permit, may revoke the same if the applicant or taxicab driver, is in the Opinion of the Sheriff, Unfit to Drive a Taxicab."

Because of said unconstitutionality, the appellees, amended the Ordinance under which appellants were again arrested to read as follows:

"The Sheriff may deny the application, or having issued the license may revoke the same if The Sheriff Shall Determine That the Applicant or Taxicab Operator Is of Bad Moral Character."

It is submitted that the State Motor Vehicle Code, paragraph 269, sets forth state-wide qualifications, and if the applicant is not possessed of the same, a license to drive will not be issued. In Section 271 thereof, are set forth grounds for permitting refusal of licenses, and Section 291 thereof, reasons for suspending or revoking licenses by a Court.

The United States District Court declared the San Diego County Ordinance unconstitutional as to the portion herein being treated in the following language:

"That Section 9 of said Ordinance as amended, and as quoted in . . . the findings herein, is void and unconstitutional in that no standard for the exercise of the Sheriff's discretion is set forth and as constituting an unlimited delegation to the Sheriff of the legislative powers of the Board of Supervisors" (Tr. pg. 22).

If the Sheriff cannot determine who is Unfit to drive a taxicab, the Sheriff cannot likewise determine whether a taxicab operator is of Bad Moral Character." In the event the Sheriff believes in a certain cult which in turn teaches that Catholics are of bad moral character, then an applicant for a taxi license who might be a Catholic could be denied a license, since the Ordinance does not set forth a standard for the exercise of the Sheriff's discretion.

Section 589.6 of the same California Motor Vehicle Code, does delegate statewide authority to locale municipalities to license and regulate the location of stands on streets and highways for use by taxicabs, in their respective jurisdiction. This limited delegation of authority however would be inapplicable to appellants, who have no reason to . . .

maintain stands on streets and highways within the jurisdiction of San Diego County.

The delegation phraseology reads as follows:

> "Local authorities may by ordinance license or regulate the location of stands on streets and highways for use by taxicabs and other public carriers for hire in their respective jurisdictions."

The avariciousness of the County of San Diego in the interpretation of this delegation of authority in creating a trade barrier is exemplified by the fact that in the former ordinance involving the first arrests of appellants to-wit: Regulation thereof, No. 6, provides in part:

> "Taxicabs licensed in counties other than San Diego County will not be permitted to pick up passengers in San Diego County; no taxicab or car for hire licensed by this office will be permitted to pick up passengers outside the limits of San Diego County."

The United States District Court found this section to be patently unconstitutional as an attempted interference with and prohibition of interstate and foreign commerce (Tr. page 22).

When constitutional rights are involved, this Court in cases coming to it from State Court will determine for itself from the record the existence of the controlling facts upon which such constitutional questions are based.

Railroad Comm. v. *Texas & P. R. Co.*, 229 U. S. 336, 57 L. Ed. 1215;

Coombes v. *Gibbs*, 285 U. S. 434, 76 L. Ed. 866;

Detroit United R. Co. v. *Detroit*, 242 U. S. 238, 61 L. Ed. 268.

It seems to us that the same inhibitions which prevent interference to goods that are brought into this country from a foreign country (*Howe Machine Co.* v. *Gage*, 100

U. S. 676, 25 L. Ed. 754; *Pittsburgh & S. Coal Co.* v. *La.*, 156 U. S. 590, 39 L. Ed. 544; *Cunard S. S. Co.* v. *Mellon*, 262 U. S. 100, 67 L. Ed. 894) should apply to human passengers who should not be interfered with when brought in from foreign countries, and, that like package goods, human cargo is entitled to be brought through a county without interference by that county.

The California Courts did not deem to answer the argument that *the local taxi ordinance imposed an undue burden on interstate commerce*, and we deem it that they have no answer to this position to our argument thereon.

III

The ordinance is in conflict with the National Transportation Policy Act, (49 U.S.C.A. 301-327) which, by regulations, covers taxicabs in respect to general definitions, hours of service, qualifications of drivers, driving of motor vehicles, accident reports, inspection and maintenance and carrying of explosives and other dangerous articles by motor vehicles, code of federal regulations, Part 90-197.

While cooperation with the State and its duly authorized officials is permitted, this does not permit a county to adopt a taxing ordinance, giving one officer the power to deprive taxicabs engaged in commerce in international transportation of their right and thus impose upon it an unnecessary burden in interstate commerce.

H. P. Hood & Sons v. *Dumond*, 336 U. S. 525, we think, is squarely in point. That case forbad additional restrictions imposed for the avowed purpose and with the practical effect of curtailing the volume of Interstate Commerce to aid local economic interests.

Here, too, while the avowed purpose was concealed in the ordinance, in practical effect that was what happened. The competitors on the American side of the line notified the

Sheriff to stop the cabs coming from Mexico so that they, the local cab competitors, could benefit economically by having the passengers removed to their own taxicabs.

IV

The Commerce Clause of the Constitution, Article I, Section 8, Section 3 was designed to reach state legislation which practically obstructs commerce, as well as that which expresses hostility toward it.

Union Brokerage Co. v. *Jensen,* 322 U. S. 202, 88 L. Ed. 1227, 152 A. L. R. 1072;
Milk Control Board v. *Eisenberg Products,* 306 U. S. 346, 83 L. Ed. 752;
Edwards v. *California,* 314 U. S. 160, 86 L. Ed. 119;
Kelly v. *Washington,* 302 U. S. 1, 82 L. Ed. 3.

The rule generally observed is that the free flow of interstate and international commerce must have its freedom from local restraint in matters requiring uniformity of regulation and are intersafeguarded by the Commerce Clause, Article I, Section 8, from State and hence from County interference:

> "The Constitution confers upon Congress the power to regulate commerce among foreign countries and the several States."
>
> *U. S. Constitution,* Article I, Section 8, Clause 3.

As said in *Bell* v. *Porter,* 159 Fed. (2d) 117:

> "This power to regulate commerce is not confined to commercial or business transactions. From an early date such commerce has been held to include the transportation of persons and property no less than the purchase, sale, and exchange of commodities, United States v. Hill, 248 U. S. 420, 423, 39 S. Ct. 143, 63 L. Ed. 337, and goods may move in commerce though

they never enter the field of commercial competition. For example, the movement of people across State lines and the unrestricted ranging of cattle across the boundary between two States in commerce."

V

The ordinance contains no special prohibitions relating to police powers and reasonably related to its purpose.

No standards are set up in the ordinance. The Sheriff is given arbitrary and capricious powers to administer the same; in this case they were exercised for the benefit of local competitors.

The State Court in its opinion stated:

> "The State's interest in its own highways has been recognized superior to the federal interest against 'burdening' commerce. . . . (citing cases)"

An examination of the San Diego County Ordinance indicates that it is bare of anything pertaining to police powers. One cannot ascertain from a reading of the ordinance what end is sought by the same. It adds nothing not already contained in the State Motor Vehicle Code, and admittedly Appellants are possessed of State Licenses and amenable to State Law concerning State issued licenses, and requirements, speed limits, insurance, etc.

In the case of *Southern Pacific Co.* v. *Arizona*, reported in 325 U. S. 761, the State of Arizona made it unlawful to operate within the State passenger trains of more than fourteen cars or a freight train of more than seventy cars. The Supreme Court examined the law carefully and determined that the law was unconstitutional because it passed beyond what was plainly essential for safety, and it did not appear that it would lessen the danger of accident.

Under the authority of said case the California Court ought to have examined the County Ordinance to see what, if anything, it contained, and in the absence of necessary provisions should have nullified the ordinance. If it contained material relating to police powers, even that in itself would not have been sufficient. A local law cannot circumvent the Federal Law by the insertion of matters supposedly under pretense of police powers, which are untrue or simply give lip service by way of form to police powers. The County of San Diego in the case at bar does not even go through the pretense of containing matters related to police powers. The law seeks neither to justify or excuse its own existence, but merely to place arbitrary powers in the hands of the Sheriff and enable him to exclude foreign commerce and discriminate in favor of local competitors.

When the defendants load passengers on the Mexican side of the border in what is known as the Federal zone it is a well-known judicial fact that they do so within the direct observation of United States Customs and Immigration Officials provided by the Government of the United States, pursuant to Congressional Acts wherein it regulates foreign commerce.

Prior to entry into the County of San Diego, the automobiles of defendants are inspected for contraband, narcotics, liquor, or any prohibited articles, matters which the so-called police regulations of the County of San Diego do not touch. As a right to use the highways of the United States, and prior to the entry into the United States by defendants in their foreign commerce activities, United States officials inspect automobiles to see if known criminals are passengers, or whether the cabs contain prostitutes, etc. The very fact that defendants are engaged in foreign commerce, gives to each citizen of the United States greater protection than San Diego County taxicabs who limit their activities to the unincorporated area of the County.

In *Hood and Sons* v. *Dumond*, 336 U. S. 525, 538, 539, this Court said:

"As the Court said in *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S. 511, 527, 79 L. Ed. 1032, 1040, 55 S. Ct. 497, 101 ALR 55, 'What is ultimate is the principle that one state in its dealing with another may not place itself in a position of economic isolation.' In so speaking it but followed the principle that the state may not use its admitted powers to protect the health and safety of its people as a basis for suppressing competition. In *Buck* v. *Kuykendall*, 267 U. S. 307, 69 L. Ed. 623, 45 S. Ct. 324, 38 ALR 286, the Court struck down a state act because, in the language of Mr. Justice Brandeis, 'Its primary purpose is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition. . . .

"Or suppose that the field of discrimination and retaliation be industry. May Michigan provide that automobiles cannot be taken out of that State until local dealers' demands are fully met? Would she not have every argument in favor of such a statute that can be offered in support of New York's limiting sales of milk for out of state shipment to protect the economic interests of her competing dealers and local consumers? Could Ohio then pounce upon the rubber-tire industry, on which she has a substantial grip, to retaliate for Michigan's auto monopoly?

"Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his export, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

"The State, however, insists that denial of the license for a new plant does not restrict or obstruct

interstate commerce, because petitioner has been licensed at its other plants without condition or limitation as to the quantities it may purchase. Hence, it is said, all that has been denied petitioner is a local convenience—that of being able to buy and receive at Greenwich quantities of milk it is free to buy at Eagle Bridge and Salem. It suggests that, by increased efficiency or enlarged capacity at its other plants, petitioner might sufficiently increase its supply through those facilities.

"The weakness of this contention is that a buyer has to buy where there is a willing seller; and the peculiarities of the milk business necessitate location of a receiving and cooling station for nearby producers. The Commissioner has not made and there is nothing to persuade us that he could have made findings that petitioner can obtain such additional supplies through its existing facilities; indeed he found that "applicant has experienced some difficulty during the flush season because of the inability of the plant facilities to handle the milk by 9 a. m.", the time its receipt is required by Boston health authorities unless it is cooled by the farmer before delivery, and a substantial part of it is not."

For which reasons we pray that the judgments below be reversed and the cause ordered dismissed.

Respectfully submitted,

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